IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

[redacted] 32

No. ~~333, Misc.~~

CLYDE BROWN,
PETITIONER,

v.

ROBERT A. ALLEN, WARDEN OF THE CENTRAL PRISON OF NORTH CAROLINA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court, denying petitioner's application for a writ of habeas corpus, (R.26-29) is reported at 98 F. Supp. 866. The opinion of the Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, is reported at 192 F. 2d 477.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether petitioner has the right to have retried and redetermined on the same evidence by habeas corpus in federal court the same questions of racial discrimination from the indicting grand jury and of the admissibility of his confession after they have been decided against him by the state trial court and the state supreme court, and after petition to the Supreme Court of the United States for writ of *certiorari* to review the judgment of the state supreme court has been denied.

2. Whether, where counsel for petitioner had taken full advantage of adequate remedies provided by state law to test claimed jury defect and inadmissibility of confessions as evidence, and petitioner's conviction had been affirmed by state supreme court and a writ of *certiorari* to review the decision had been denied by the United States Supreme Court, and all of this was before the court upon the return of the show-cause order, the District Court should have issued the writ, had a hearing, and taken testimony nonetheless.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution involved are set fourth in the Petition at page 4.

STATEMENT OF THE CASE

The petitioner was convicted of the capital crime of rape at the September, 1950, Term of the Superior Court of Forsyth County (R. 44, Exh. No. 1, 15) and was sentenced to death by asphyxiation (R. 44, Exh. No. 1, 208-209).

Petitioner appealed to the Supreme Court of North Carolina at the Fall Term, 1950. In this appeal petitioner presented to the Supreme Court eight questions, some of which involved the same questions of law as are presented here. (R. 66, Exh. No. 5, 1-2; Br. C.C.A. 4, 2). The Supreme Court of North Carolina found no error and its opinion filed 2 February, 1951, is reported as STATE v. BROWN, 233 N. C. 202. The volume of official Advance Sheets of the

Court containing this opinion was filed in the hearing before the District Court as Exhibit No. 8 and appears in the record. (R. 69).

Petitioner then filed a petition with the Supreme Court of the United States for a writ of certiorari the 28th day of April, 1951, (R. 45-53) with supporting brief (R. 54-63). The State of North Carolina, respondent, filed a brief opposing the issuance of the writ (R. 68, Exh. No. 7). The Supreme Court of the United States denied the writ May 28, 1951, (R. 64).

The petitioner filed a petition in forma pauperis for a writ of habeas corpus with the District Court of the United States for the Eastern District of North Carolina on June 21, 1951, seeking release on the grounds of systematic racial discrimination from the grand jury and incompetency of the confession admitted in evidence. (R. 5-16). An order was issued the same day directed to the respondent, directing that he appear before the District Judge on the 5th day of July, 1951, and show cause why the writ of habeas corpus prayed for should not issue and make a return or answer the petition. This order also enjoined respondent from putting into execution the death sentence standing against the petitioner (R. 18).

The respondent filed answer to the petition in due time (R. 19-25). In this answer he referred to all the proceedings in the Supreme Court of North Carolina, including the opinion of said Supreme Court as officially reported in the case of STATE v. BROWN, 233 N. C. 202, 63 S. E. 2d 99, and all proceedings in petition to the United States Supreme Court for certiorari, and made them a part of the Answer and Further Answer as if fully copied therein and set forth, and stated that a duly authenticated copy of all proceedings in the Supreme Court of North Carolina and in the United States Supreme Court, as a result of the petitioner's appeal, would be offered in evidence by respondent on the hearing of the proceeding. (Ans. pp. 4-5; R. 22-23). This was done and at the hearing before the District Judge the following were offered in evidence, to wit:

1. The transcript of record on appeal in the Supreme

Court of North Carolina (one bound volume, Exh. No. 1, R. 44);

2. Petition to United States Supreme Court (Exh. No. 2, R. 45);
3. Attested copy of order denying petition (Exh. No. 3, R. 64);
4. Addendum to Record, Supreme Court of North Carolina (Exh. No. 4, R. 65);
5. Defendant's Brief, Supreme Court of North Carolina (Exh. No. 5, R. 66);
6. State's Brief to Supreme Court of North Carolina (Exh. No. 6, R. 67);
7. State's Brief opposing petition for writ of certiorari to the United States Supreme Court (Exh. No. 7, R. 68);
8. Advance Sheet of North Carolina Supreme Court (Exh. No. 8, R. 69).

Upon the return date specified in the show-cause order, July 5, 1951, the hearing was had and the Court reserved its opinion. Later, on July 19, 1951, the Court entered a memorandum opinion (R. 26-29), made certain findings of fact and conclusions of law (R. 30-35), and entered an order denying the writ of habeas corpus, dismissing the petition, and vacating the stay of execution. (R. 36). Whereupon, petitioner gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, which notice was filed in the District Court August 6, 1951. (R. 39).

The matter was argued before the Court of Appeals for the Fourth Circuit on the 12th day of October, 1951. On the 5th day of November, 1951, the said Court of Appeals handed down an opinion affirming and sustaining the opinion and judgment of the District Court. The mandate, containing this opinion, was certified to the United States District Court for the Eastern District of North Carolina the 6th day of December, 1951. On the 20th day of December, 1951, pursuant to a petition for stay of execution of sentence and judgment in order to permit the petitioner to apply to the Supreme Court of the United States for a writ of certiorari to seek the review of said opinion of November 5, 1951, an order was entered by the District Judge

staying the execution of the sentence and judgment against the petitioner. The petition to this Court to issue a writ of certiorari to the Court of Appeals for the Fourth Circuit followed.

In the trial in the Superior Court of Forsyth County, before the selection of the jury and before pleading to the bill of indictment, counsel for petitioner entered a special appearance and moved to quash the bill of indictment upon the grounds that there had been systematic and arbitrary limitation of negro representation upon the grand jury solely on account of race. (R. 44, Exh. No. 1, 22). Evidence was taken on this motion from eight witnesses and at least two exhibits were introduced. (R. 44, Exh. No. 1, 22-49). After hearing the evidence the motion was denied and the Presiding Judge entered an order finding certain facts and making certain conclusions of law to the effect that the grand jury was in all respects lawfully constituted; that the Constitution of the United States and the Constitution of North Carolina, and the General Statutes of North Carolina, and any and all Public-Local Acts relating to the preparation of the jury list and the drawing of the grand jury for the July 3, 1950, Criminal Term of the Superior Court of Forsyth County, which was the jury that found the bill against petitioner, had in all respects been complied with. (R. 44, Exh. No. 1, 49-52).

During the trial of the case the petitioner objected to certain testimony in regard to his confession. The Judge sent the jury from the Courtroom and heard the evidence, including the statement of the petitioner with regard to the circumstances under which the confession was made. (R. 44, Exh. No. 1, 94-133). After hearing all the evidence that counsel for petitioner desired to offer, the court found as a fact that the statements were freely and voluntarily given and were competent. (R. 44, Exh. No. 1, 133).

ARGUMENT

In his brief petitioner enumerates two specifications of error and lists three questions involved (Br. pp. 7-8). He divides his argument into the discussion of four points as follows:

I. "THE DISTRICT COURT COMMITTED ERROR IN DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WITHOUT HEARING." (Br. pp. 8-9)

II. "PETITIONER HAS BEEN DEPRIVED OF THE EQUAL PROTECTION OF THE LAW BY THE DISCRIMINATORY AND ARBITRARY EXCLUSION OF NEGROES FROM (GRAND AND/OR) PETIT JURIES IN FORSYTH COUNTY, SOLELY FOR REASON OF RACE, INCLUDING THE GRAND JURY WHICH INDICTED AND THE PETIT JURY WHICH CONVICTED PETITIONER." (Br. pp. 9-13)

III. "THE CONVICTION OF PETITION DEPRIVES HIM OF HIS LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW IN VIEW OF THE ADMISSION INTO EVIDENCE OF HIS ALLEGED CONFESSIONS." (Br. pp. 13-17)

IV. "THE WRIT OF HABEAS CORPUS SHOULD HAVE ISSUED IN THE INSTANT CASE." (Br. p. 17).

In his petition he sets out two "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" (Petition pp. 5-6), to wit:

1. For reasons set out at pages 8 to 9 of the brief, the dismissal by the District Court of petitioner's application for writ of habeas corpus without hearing, and the affirmance thereof by the Court of Appeals, was in conflict with the statutory requirement (28 U S C A § 2243) and the applicable decisions of this Court. WALKER v. JOHNSTON, 312 US 275, 85 L. ed. 830; PALMER v. ASHE, 72 S. Ct. 191.

2. For reasons set out at pages 9 to 17 of the brief, (a) the denial of motion by petitioner challenging the grand jury which indicted him, was in conflict with the applicable decisions of this Court, VIRGINIA v. RIVES, 100 US 313, 322, et seq., (citing in all twenty cases), and (b) the admission into evidence of the alleged confessions, in view of the undisputed evidence

in the case, is also in conflict with the applicable decisions of this Court. BROWN v. MISSISSIPPI, 297 US 278, et seq., (citing in all fourteen cases).

A careful scrutiny discloses the fact that Point II in the brief in the instant case is identical with Point I in the brief in support of the petition to the United States Supreme Court for certiorari to the Supreme Court of North Carolina, Case 488, October Term, 1950, and the brief in this case (pp. 9-13) is identical with the brief in that case (pp. 8-12, R. 56-60). The same twenty cases are cited in both briefs and in the same order.

Likewise, Point III in the brief in the instant case is identical with Point II in the brief in Case 488, supra, and the brief (pp. 13-17) is identical with the brief in that case (pp. 12-15, R. 60-63). The same fourteen cases are cited in both briefs and in the same order.

This same identity also appears in the petition to the District Court for the writ of habeas corpus. The statement of the matter involved in the petition (R. 7-8) is identical with the statement in the petition to the United States Supreme Court in Case 488, October Term, 1950, (R. 49-50) and, except for the recital of additional procedural steps, is identical with the statement in this case, (Pet. 1-3). The first point is headed and treated the same in the petition to the District Court (Pet. 9-12) as Point I in the brief in Case 488 (Br. 8-12, R. 56-60) and the same as Point II in the brief in the instant case (pp. 9-13). The second point is headed and treated the same in the petition (Pet. 12-15) as Point II in the brief in Case 488 (Br. 12-15, R. 60-63) and the same as Point III in the brief in this case (pp. 13-17).

I.

THERE IS NO CONFLICT OF DECISION

1. Petitioner contends that the statute, 28 USCA § 2243, requires the District Court to issue the writ, hold a hearing and take testimony. He quotes a portion of the section. (Br. p. 9). However, another portion of the section provides:

> 'A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ *or issue an order directing the respondent to show cause why the writ should not be granted,* unless it appears from the application that the applicant or person detained is not entitled thereto." (Emphasis added)

In this case the District Court issued a show-cause order (R. 18). Respondent filed answer (R. 19-25), and by reference incorporated therein the full proceedings in the Supreme Court of North Carolina (R. 22) and upon petition to the United States Supreme Court for certiorari (R. 23). At the hearing had on the return date of the show-cause order, July 5, 1951, these court records were introduced in evidence as eight exhibits (R. 30-31). Thus, the Court was able to view the facts on which the opposing parties relied and upon these facts found that applicant was not entitled to the writ (R. 29, 35).

This procedure is authorized by the statute, 28 USCA § 2243, supra, and is approved in the opinions of this Court. WALKER v. JOHNSTON, 312 US 275, 85 L. ed. 830, the case cited by petitioner in support of his contention that the District Court is required to issue the writ, hold a hearing and take testimony, approves this procedure. One question presented in that case is: "(1) Was the District Court, on the filing of the petition, bound forthwith to issue the writ and have the petitioner produced in answer to it?" (p. 283). In response to this question the court says, (p. 284): "It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. *Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ* with consequent production of the prisoner and the witnesses may be avoided *where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. . . . This practice has*

long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute." (Emphasis added).

The case of PALMER v. ASHE, Warden, 72 S. Ct. 191, 95 L. ed. 1353, 341 U. S. 919, in which the petition was granted, is a case in which, like the BRUNSON v. NORTH CAROLINA and allied cases, the petition was for a writ of certiorari to the Supreme Court of the State in which petitioner had been tried and in the courts of which he was in custody, the same sort of petition which was denied by this court in the case of BROWN v. NORTH CAROLINA, Case No. 488, October Term, 1950. Had this Court deemed the petition warranted it would have granted certiorari in May, 1951. Yet the grounds and contentions of petitioner are the same now as they were then. Clearly there is no conflict of decision with respect to Reason No. 1 relied on by petitioner.

2. Petitioner contends that the denial of his application for the writ upon (a) his challenge to the grand jury and (b) the inadmissibility of his confession was also in conflict with applicable decisions of this Court.

As hereinbefore pointed out, the contentions of petitioner and the grounds upon which he has contended he was entitled to reversal have been identical throughout his appeal to the Supreme Court of North Carolina; his petition to this Court for writ of certiorari to the Supreme Court of North Carolina, Case 488; his application for habeas corpus to the District Court; and his appeal to the United States Court of Appeals for the Fourth Circuit. And, except for the first specification of error, they are the same in this instant petition. On such showing his appeals and petitions have been consistently denied. Certainly, there is no conflict of decision.

For the convenience of the Court and to save repetition respondent's brief to the Court of Appeals for the Fourth

Circuit, Case No. 6332, is submitted herewith. In the argument in this brief, pages 7-12, respondent outlines his position in regard to these points.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

The District Court found that the facts found by the Trial Judge, in respect to the composition of the grand jury, are supported by the evidence before him, and that the facts found by that Court in respect to the question of admission of statements made by the defendant are also supported by the evidence. (Findings of Fact and Conclusions of Law, p. 5, R. 34). He further found that the petitioner was represented by experienced and capable counsel at every stage of the proceedings in the state courts, and that petitioner and his counsel were given full and fair opportunities to present evidence and argument with respect to the two alleged violations of his constitutional rights, which were there raised and adjudicated and which he now (on petition for writ of habeas corpus to the District Court) attempts to raise again; that the remedies provided by the law of North Carolina through resort to its courts afforded to petitioner a full and fair adjudication of the federal questions raised. (Findings of Fact and Conclusions of Law p. 5, R. 34).

Upon all the findings of fact, which were based upon the petition, the answer thereto, and the exhibits filed by the respondent, (Findings of Fact and Conclusions of Law, pp. 1-6, R. 30-35) the Court concluded:

> 1. That the record and findings thereon present no unusual situation, and a respectful consideration for the action of the North Carolina Courts and the denial of certiorari by the Supreme Court of the United States requires that the petition for writ of habeas corpus be denied and that the petition be dismissed." (Findings of Fact and Conclusions of Law, p. 6, R. 35).

In his memorandum opinion (R. 26-29) the District Judge cited two cases of the Court of Appeals for the Fourth Circuit, to wit: STONEBREAKER v. SMITH,

163 F. 2d 498, and JERRY ADKINS v. W. FRANK SMITH, 188 F. 2d 452, and quoted from the second case as follows: "It would be intolerable that a federal district court should release a prisoner on habeas corpus after the state courts have refused him relief in precisely the same case on a similar writ and the United States Supreme Court has refused to review their action on certiorari. This would be, in effect, to permit a federal district court to review the Supreme Court of the United States as well as the highest court of the state." To this he added: "There appears no semblance of reason for a departure from the general rule laid down in these two cases." (Memorandum Opinion, p. 4, R. 29).

In his brief, (p. 10) petitioner lays great stress on the fact that just about two and a half years ago this court had occasion, in a per curiam opinion of one word, to reverse five convictions arising out of the State of North Carolina, on the grounds that Negroes had been systematically and arbitrarily excluded from grand and petit juries in Forsyth County, North Carolina, the very county from which the instant proceeding comes, citing BRUNSON v. NORTH CAROLINA, 333 U. S. 851, 92 L. ed. 1132; JONES v. NORTH CAROLINA, Ibid; JAMES v. NORTH CAROLINA, Ibid; KING v. NORTH CAROLINA, Ibid; and WATKINS v. NORTH CAROLINA, Ibid. Petitioner apparently contends that, since this court had reversed those five cases from Forsyth County, it should also reverse this case from Forsyth County. The attention of this court is respectfully directed, however, to the fact that these five cases were reversed March 15, 1948, upon writs of certiorari to the Supreme Court of North Carolina; that when the case of CLYDE BROWN v. NORTH CAROLINA was before this court as Case No. 488, Misc., October Term, 1950, certiorari was denied May 28, 1951. Had this court found justification for the same holding in the CLYDE BROWN case as it had in the BRUNSON and allied cases it would have reversed it or would have granted certiorari in Case No. 488, May 28, 1951. This it did not do.

Now petitioner seeks again to have this court review his trial in the State court of North Carolina and advances in

support of his contention the very same and identical claims now that he presented before. (Compare petition for writ of certiorari to the Supreme Court of North Carolina, October Term, 1950, R. pp. 45-63; petition for writ of habeas corpus to the District Court, R. pp. 6-16; petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and brief in support thereof, in Case No. 333, October Term, 1951). This the respondent contends he is not entitled to.

The respondent contends that petitioner is not entitled to have retried and redetermined on the same evidence by habeas corpus in federal court the questions of racial discrimination from the indicting grand jury and of the admissibility of his confession after they have been decided against him by the State Trial Court and the State Supreme Court, and after petition to the Supreme Court of the United States for writ of certiorari to review the judgment of the State Supreme Court had been denied. And respondent respectfully contends when these facts were clearly before the District Judge for his consideration upon petition for writ of habeas corpus they presented to him the incontrovertible facts of the court records from which it appears, as matter of law, that no cause for granting the writ exists and the District Court was clearly correct in denying the writ and dismissing the petition. (R. 6-69, which included the eight exhibits).

From the above it appears clearly that the District Court had sufficient evidence before it at the hearing upon the return of the show-cause order to see from the incontrovertible facts as contained in the court record that no cause for granting the writ existed. (WALKER v. JOHNSTON, supra, p. 284). Therefore, the District Court was correct in denying the writ and the Court of Appeals was correct in affirming the judgment of the District Court.

CONCLUSION

For the foregoing reasons is it respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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